IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 78-67**

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TRUSTEES OF BOSTON UNIVERSITY,
*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## SECOND SUPPLEMENTAL BRIEF OF THE TRUSTEES OF BOSTON UNIVERSITY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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This Second Supplemental Brief is filed in response to the Supplemental Memorandum filed by the Union on February 27, 1980. It is the position of the Trustees of Boston University ("Boston University") that the instant petition is clearly meritorious in view of the Court's decision of February 20 in *N.L.R.B.* v. *Yeshiva University*, 48 LW 4175, and

that, at the very least, this case should be remanded to the First Circuit for further proceedings consistent with the Court's *Yeshiva* decision.

## I.

Contrary to the Union's assertion, the Court's *Yeshiva* decision does not require denial of Boston University's petition for a writ of *certiorari*. Rather, that decision clearly compels the opposite result. As *Yeshiva* found that faculty members are managerial employees excluded from the coverage of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, *et seq.* ("the Act"), then, *a fortiori*, the department chairmen at Boston University must be excluded from coverage of the Act as managerial employees. It follows, moreover, that the Board's inclusion of the department chairman in the unit found appropriate at Boston University not only taints the overall appropriateness of such unit, but raises serious numerical questions with respect to the underlying election which was won by the Union.

At all material stages of this case, Boston University has contended, and still contends, that its department chairmen should be excluded as managerial employees. The Court of Appeals, however, agreeing with the Board rejected this contention, stating, *inter alia*, that "the Board was entitled to find that [the chairmen were acting] . . . 'in the interest' of the faculty, not the employer." *Trustees of Boston University* v. *N.L.R.B.*, 575 F.2d 301, 306 (1st Cir. 1978). In light of this Court's decision in *Yeshiva* specifically rejecting this approach (42 LW at 4179), we submit that the First Circuit's decision is not tenable.



The Union itself, moreover, recognized the inconsistency between the First Circuit's *Boston University* decision and the Second Circuit's (and now this Court's) rationale in the *Yeshiva* case. Thus, at pp. 2-3 of its Supplement to Brief filed in this very case in January, 1979—a time when petitions for *certiorari* were pending in both *Boston University* and *Yeshiva*—the Union contended that the instant petition should be granted and stated:

> If the petition in *Yeshiva* is denied, or if it is granted and that decision is affirmed, an anomalous situation would result if the petition in this case is denied. Although the bargaining order in this case [*Boston University*] would impose on Boston University a continuing obligation, enforceable by contempt proceedings in the court of appeals, at Yeshiva and at other similar universities, especially those in the Second Circuit, no such obligation would be enforced. Moreover, in this event, it would remain open to Boston University to argue, in a variety of subsequent Board proceedings, that its faculty are managerial or supervisory employees, thereby very possibly defeating its obligation to bargain.

Furthermore, the decisions of the two courts of appeals are closely related and at least arguably in conflict. . . . The Board included the chairmen [in *Boston University*] on the theory that, in making recommendations on matters of academic governance, they acted primarily in the interest of the faculty. *But obviously if the faculty's collective role in governance matters deprives them of employee status, then the chairmen's role in these matters, even if exercised in the interest of the faculty, renders them super-*

*visory or managerial employees.* (Emphasis added.)

We submit that the force of the Union's argument has not diminished. Since that time, the Court has, of course, granted the petition for a writ of *certiorari* in *Yeshiva* and affirmed the Second Circuit's decision. This Court's decision carries with it an implicit rejection of the First Circuit's decision in the instant case.

It is no less true today that denial of the instant petition would countenance the anomalous result of this Court's exclusion in *Yeshiva* of faculty members as managerial employees, but the inclusion here of department chairmen—faculty members who certainly have managerial and supervisory responsibilities in addition to those of normal faculty members.

## II.

It is true, as the Union asserts, that since the First Circuit enforced the Board's bargaining order, the Union and Boston University executed a collective bargaining agreement, one of the terms of which recites that the agreement shall remain effective until August 31, 1981. But it is not accurate to insinuate, as the Union also does, that the existence of the collective bargaining agreement has rendered "moot" both the Board's bargaining order and this pending judicial proceeding. On the contrary, the bargaining agreement itself, as well as material events which preceded its execution, demonstrate that the issues pressed in the instant petition have not been resolved by the parties and that the continued existence of the executed agreement has been expressly made to depend on the outcome of this case.



Thus, a Memorandum of Settlement in the form of an addendum to the agreement, which was signed by the parties on April 13, 1979, and which brought the basic bargaining agreement into being, expressly provides, *inter alia* [1]:

* * * *

> 5. It is understood that the collective bargaining Agreement is subject to the final disposition of First Circuit Cases Numbers 77-1143, 77-1365, and 77-1226, now pending in the Supreme Court of the United States upon a petition of certiorari (No. 78-67). However, it is agreed that, by the execution of this settlement Agreement, neither party waives any of its rights with respect thereto; and it is further agreed that the foregoing does not prejudice the Chapter's right to claim that this agreement remains in effect for its duration.

Nor is it happenstance that the quoted provision of the Memorandum of Settlement is an integral part of the parties' agreement. Thus, the Union has not in its Supplemental Memorandum fully apprised the Court of the circumstances which led to the inclusion of the provision in the agreement.

What in fact happened was this. The terms of a draft agreement were negotiated by representatives of the Union and Boston University's Trustees. When completed, the draft agreement was submitted to the Trustees. The Trustees refused to approve the draft because, among other reasons, the draft language

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[1] The full text of the Memorandum of Settlement is quoted at page 2a of the Union's Supplemental Memorandum. However, only a passing reference—cryptic at best—is made by the Union to the language quoted in the text. See Union's Memorandum, note 4.

neither mentioned the instant then pending petition for a writ of *certiorari* nor subordinated the agreement's continued existence to the petition's outcome. Because of the Trustees' refusal to sign the draft agreement, there was a faculty strike supported by the Union. Thereupon, there were further negotiations in the presence of a federal mediator between the representatives of the Trustees and the Union. The latter negotiations ultimately brought about a final agreement between the parties and the end of the strike. The final agreement between the parties —which is the agreement the Union now cites to the Court—contains, at the insistence of the Trustees, various important modifications of the substantive terms of the earlier draft agreement. The final agreement also includes the Memorandum of Settlement which, again at the express insistence of the Trustees, contains the above-quoted provision expressly referring to this pending judicial proceeding.

We therefore submit, in view of the express language of the Memorandum of Settlement, as well as the circumstances leading to its execution, that it is utterly absurd for the Union now to contend that the parties' collective bargaining agreement moots the instant petition.

Respectfully submitted,

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